

Kansas Law Review

SIXTY-EIGHT YEARS AT LAW

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In spite of a firm decision that my writing and speaking days were at an end, it is not possible for me to refuse the invitation of the editors of the *Kansas Law Review* to contribute to its pages. Long absence from my native state has never weakened the "ties that bind." My span of life, now covering one half of the history of the United States, began on a Kansas farm only nine years after the death of Abraham Lincoln. My father settled in Kansas in 1857, taking an active part in making Kansas a "free State," and serving throughout the Civil War in the 12th Kansas regiment. For twenty-five years my mother was a successful teacher in the country schools of the state. My sister, for whom Corbin Hall was named, was a professor of German in the University. It is now seventy years, last June, since I received my bachelor's degree from the University of Kansas, and for three years thereafter I taught in the high schools of Augusta and Lawrence. My forty classmates in the class of 1894 were dear to my heart; four of them still survive. In all of my subsequent seventy years of experience, including stretches in four of our greatest universities, I have found no abler teachers than Templin, Carruth, Williston, and Snow.

In 1896 I decided to study law, expecting to enroll in the Kansas Law School in the following year. After consultation with the dean, "Uncle Jimmy" Green, I purchased and read all of the textbooks then in use in the first year class. These were all a part of the then recently published "Hornbook Series." Although I never attended a class and never discussed a legal problem with him, Uncle Jimmy always treated me as one of "his boys."

Since the purpose of this contribution is to make a last statement of my conclusions as to legal education and as to the nature and growth of "law," in the pages of the *Law Review* of my Alma Mater, my first statement will be that my reading of those "Hornbooks" was a total waste of time. It did not do me much harm, for the reason that it made so little impression of any kind. I may have innocently supposed that these books were written by great scholars who knew "the law" and were reducing it to print. But my experience under Snow and Williston prevented me from making the mistake, made that first year by a green young high school graduate who ate at the same table with me and who was studying the same "Hornbooks." After his first month in the law school, he told me that he had learned the secret of law study. The first thing to do, he

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said, is to "learn the principles," referring thereby to the turgid black-letter paragraphs that proliferated in the "Hornbooks." I had never been able to memorize, and parrot-like to repeat, the "rules" and doctrines and generalizations of men, often (if not always) based on quite insufficient life experience and inaccurate observation, but solemnly repeated down the corridors of time. Templin had put me through a book entitled *Inductive Logic* by that clearest minded of men, John Stuart Mill. It was only after beginning the teaching of "law" that I fully realized that the meaning and value of any "rule" or generalization are wholly dependent on the specific items of life experience and observation on which they are based. But my college instruction and my own limited boyish experience had already caused me to doubt many of the dogmatic "rules" and generalizations of ignorance.

This is not to say that the "rules" and generalizations of our predecessors should be, or safely can be, disregarded. But they must be continually tested and modified as new and reliable experience is accumulated and compared. We have even more reason to doubt the current easy and over-confident assertions of ignorance and wishful thinking with which we are continually bombarded.

In 1897, for purely personal reasons, I entered the Yale Law School, having no knowledge whatever of its merits or its reputation. It had recently adopted a three year requirement for graduation, instead of two, but it permitted college graduates to complete the required work in two years, if they cared to undertake "so arduous a labor." The labor did not turn out to be "too arduous," for the degree of LL.B. was conferred on me in 1899, even though I played on a baseball team both years, did some typewriting for pay, and was a substitute teacher in the New Haven high school. The reason that it was not "too arduous" was that the teaching was chiefly by lecture and textbook. In each course a few specially selected case reports were added, but these were always chosen as illustrations of the "rules" and principles that were handed out. These cases were always excellent and interesting, but we were never required to study and discuss a group of cases, to pass an immature judgment with respect to conflicting decisions or inharmonious reasoning. In the cases that we studied, the court's decision was always "right." *Ipse dixit*. Any competent student in any respectable law school today will readily perceive why, under such a system, the labor of compressing the three year course into two years was not "too arduous."

Ever since that masterful thinker and writer, Sir William Blackstone, had published his *Commentaries on the Laws of England* in the middle of the 18th century, his work had constituted the chief subject matter of every young lawyer's study, whether as a law office apprentice or in a law school. In 1897, at Yale, one of our first textbooks was Professor Robinson's *Elementary Law*, a

condensation of Blackstone's "rules" and "principles." Each paragraph was accompanied by citations of several other "authorities," but we never examined any of them. We were confident that they would always confirm the text. That small volume constituted my introduction to the common law, including criminal law, contracts, torts, and property. It was indeed pretty dull reading, but we were docile enough and lazy enough to be willing to be "told" the law. I have no doubt that many students in a modern casebook course are both docile enough and lazy enough to desire to be told "the law" and to accept it as "told." About 1930, after being in school for three months, a boy who later became one of my best students and who is now a member of one of the large New York law firms, came to my desk and said: "Mr. Corbin, why do you make us read all these cases? No two cases are alike."

In my four years of minor "law practice" in the mining camp, Cripple Creek, Colorado, partly as an assistant prosecutor, I learned little new law other than the Colorado Criminal Code and Code of Procedure. Some of the pleadings that I drew in my few civil cases plainly exhibited my lack of training in the analysis of the factual problems involved and in the construction and application of legal "rules" and principles. Fortunately, most of my legal opponents were equally incompetent.

It was not until I was recalled to Yale in 1903 (at a very small salary) that I realized the extent of my ignorance of the nature and growth of law and my incapacity to construct or to criticize any stated "rule" of law. Luckily, the course on first year contracts was assigned to me, my students being mere beginners even less well prepared. The textbook already assigned to the course was Clark on *Contracts*. It was one of the better "Hornbooks," for the reason that it was, as expressly stated by its author, based upon the elementary work on *Contracts* by Sir William Anson. This textbook was accompanied by a small booklet of case reports. I found almost at once that it was impossible for me to ask my students merely to repeat "what the book said." Mere verbally repeated "rules" created no excitement and aroused no interesting discussions. It was very different when the student was required to state accurately the reported facts of a case, eliminating the immaterial and inoperative, to state the issue before the court, giving its decision and the supporting reasons and doctrines, and then to attack or to defend its decision and reasoning. The preparation of a student for such a classroom exhibition does indeed require "arduous labor," forces him to exercise an independent judgment, and warns him that he will be subjected to the immediate criticism of his fellow students as well as of his instructor. He soon realizes the inadequacy of his basis for an independent judgment and the extent of the labor that looms before him. It is no wonder that after a few months the student is in a maze of uncertainty. Are there no controlling "rules of law"? Why doesn't the instructor tell us?

Of course, there are immense differences in the artistic capacity of instructors to carry on by this method a law school course or a course in any other subject. The instructor's preparation for his classroom ordeal must be far more "arduous" than that of any student. He promptly discovers that his own basis for an independent judgment is inadequate, that it is true that "no two cases are alike," that the "rules" and "principles" laid down by the judges and by the text writers are variable and conflicting, and (if he is competent) that the rules and principles are themselves in a constant state of evolutionary change. No system of law, Roman, Anglo-American, or any other, begins with even a small number of rules, principles, doctrines, or generalizations of any kind, reduced to words or other hieroglyphics. They are all the creations of men, proliferating like the leaves of the trees as population expands, transactions multiply, conditions of life change, and the opinions of men as to what makes for their welfare and survival also change. They are the creations of men, judges, legislators, writers, commentators (Blackstone, Kent, and much lesser men), stated and restated in words (often obscure and ambiguous), modified and abandoned, as a part of the evolutionary development of what we call "civilization." A law instructor or writer, therefore, must keep on his intellectual toes, running his level best to keep up with the procession. His mind must keep forever young and active, aware that justice does not stand pat, collecting and comparing and correcting with never failing industry and interest. How much easier it is (and how feckless and incompetent) to become a professor Dryasdust, meekly accepting "authority" and repeating old doctrine long after it is ready for the grave!

Some forty years ago, the American Law Institute was founded by a large group of judges, lawyers, and law professors. Their avowed purpose was to remove the existing uncertainty and confusion, to eliminate conflict, and to produce by the joint effort of all the learned doctors such a restatement of the "rules" and "principles" of "the law" that they would be "plain and clear" and easily and uniformly applied. The present writer was one of the organizers of the Institute and acted as a Co-Reporter of the *Restatement of the Law of Contracts*. Were the learned doctors learned enough, and did the *Restatement* that they drafted attain the purpose of the Institute? The *Restatement* was not and could not be a mere rewording of the rules and principles that had previously been stated in other words, a mere putting of "old wine in new bottles." The work required a "choice" among varied and conflicting rules and principles, the abandonment of some and the substitution of new ones in new words. You may be sure that the learned doctors did not always agree upon the choices that were made. There is no doubt that in some places some degree of improvement was made. Discussions were useful and effective, and the result constituted one more move in the evolutionary development of law. But the learned doctors were not learned enough, in some places they merely restated former rules and principles

that were even then substantially moribund or even actually dead. And fortunately they could not foresee the future and could not produce a restatement that would withstand the ravages of time and change. They could not stall the constant evolutionary process of life. Less than thirty years later the *Restatement* must be revised, a new set of learned doctors are restating the *Restatement*. An ordinary citizen, and even a lawyer or judge or professor, will be astonished at the variation between the old *Restatement* and the new, both in the substance of sections as well as in their form of wording. The present writer, a surviving Co-Reporter, at the age of 85, was asked by the Council of the Institute to indicate the sections of the *Restatement of the Law of Contracts* that in his judgment needed revision. In complying with that request, he at once observed that every section required revision in greater or lesser degree, that some sections should be wholly abandoned and new sections created, that the former commentary paragraphs should be almost wholly rewritten, and that old illustrations should be critically considered and often replaced and supplemented by new ones. Instead of merely indicating the places requiring revision, the writer spent the major part of eighteen months in making his one-man revision of practically the entire *Restatement*, including sections, commentary, and illustrations. Some sections were entirely rewritten, especially in Chapter 9 on Interpretation and the "Parol Evidence Rule." Photostatic copies of this one-man revision were made by the Council and put in the hands of the Committee on Revision for them to use and abuse as they should see fit. Their completed revision when adopted by the Institute will not look like this one-man effort, but it certainly did not discourage them from making a revised restatement of their own, in the light of such learning as exists today. They will not suppose that the one surviving ancient Co-Reporter is wedded to the forms of the document that he helped to create more than thirty years ago. Also, they will realize more keenly than did the earlier draftsmen that their product will require and receive another revision by their successors after another thirty years. Like the first *Restatement*, their revision will be one more material step in the evolutionary process of the "law."

It is now far too late for this writer to attempt in this article to demonstrate the evolutionary process by a discussion of one or more specific rules or principles, supported by a collection of judicial decisions and logical argument. He must rely upon his general treatise, now consisting of twelve volumes, in which he presents and supports his many "tentative working rules" of the law of contracts. Work on that treatise was formally commenced more than forty years ago. Since the publication of that treatise in 1950-51, then in eight volumes, the author received the entire West reporter system, collecting and critically examining all of the contract decisions and reported opinions in the courts of the United States. He ventured to make extensive analytical and

critical notes, with a brief statement of the reported facts, on the more important and interesting cases, not hesitating to concur or dissent, just as do all the judges of all the appellate courts. The notes so made have been inserted as an annual pocket supplement to all of the volumes, these supplements having been incorporated into an expanded second edition of four of the original volumes. This work was continued down to May 18, 1964, when failing eyesight forced its termination. This review of a fifteen year segment of all the reported contract cases was a constant continuing legal education to the author. It is by such a study and comparison of court decisions and reasoning, dealing with the ever changing facts and conditions of life that an author receives the major part of his legal education. It is by such a study and comparison that the soundness and quality of his work must be judged.

In the Preface to the 1964 Pocket Supplement, the author writes as follows:

A study of the appellate court decisions can never decrease in value or interest, for the reason that they constitute the living evidence of the continuing evolutionary process of our judicial system, both in the statement of its "working rules," and as to its success or failure in the administration of "justice." Such a study necessarily demonstrates the possibility of constructing reasonably definite "working rules" to serve as guides to the lawyer in giving advice to his client and to the courts in reaching and justifying a decision. These rules can never be absolute and eternal; as "guides" they cannot be infallible; but if well constructed they can be useful. At the same time confusion and injustice are the sure result of the uncritical repetition of verbal formulas handed down from the past. A worded rule is of little value apart from the facts to which it is applied; and the very existence of a "rule" depends upon the sum-total of its applications. With the expansion of population, the changes in social, economic and physical conditions, and the variations in the prevailing notions of men as to justice and morality (the *mores* of the time), all "rules of law," constitutional, statutory and judge-made, must likewise change. Certainty is an illusion, and the illusion of certainty is the mother of injustice and turmoil.

Our system of legal rules and principles is a very "human" product, made and remade by the work of the judges and other men as they mold and adjust it in accordance with what they believe to be required for the welfare and survival of mankind. Nothing is gained by continuing the dispute over "natural law" as opposed to human law. Our system of evolutionary man-made law is also "natural" law. It is as "natural" as rain, as "natural" as birth and death.

More than forty years ago, this writer listened to four magnificent lectures by Justice Benjamin N. Cardozo, published and republished in a small booklet with the title *The Nature of the Judicial Process*. The then Chief Judge of the New York Court of Appeals was induced to prepare those lectures, when he demurred on the ground that he had "no message to deliver," by my asking him whether he could not "explain to our students the process by which he arrived at the decision of a case, with the sources to which he went for assistance." With only a moment's hesitation he replied: "I believe I *could* do that." One key

paragraph in that course of lectures that I have often quoted before and that I shall here quote once more, is as follows:

I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience. I found with the voyagers of Browning's "Paracelsus" that the real heaven was always beyond. As the years have gone by, and I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation, and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth in which principles that have served their day expire and new principles are born.¹

I have never heard any lecture by any man on any subject that produced such an effect upon his audience. Upon reading my description of this effect and of the lecturer himself,² Judge Friendly, United States Circuit Judge in New York, wrote to me that Cardozo was "the saintliest man that he had ever known." Such is my own experience.

There is only one small amendment that the present writer would make to the paragraph quoted above from Cardozo. It is not merely "in its highest reaches" that the judicial process is "creative." There are occasional cases, often called "cases of first impression," in which the creative nature of the court's process is obvious and in which the judge is clearly conscious of that fact. In such a case the judge's opinion may contain a newly stated rule, or an express overruling of a former decision, or a variation of a former rule stated in different words. A revered teacher of my own, Simeon E. Baldwin, Chief Justice and Governor of Connecticut, and founder of the American Bar Association, when criticizing an article of mine entitled *The Law and the Judges*, published in the *Yale Review* in 1914, said that there were only two instances of judge-made law in the history of Connecticut. Without doubt, he was thinking of two specific cases in which the court had expressly laid down and applied a "new" rule or had expressly overruled and refused to apply a rule that had previously been stated and applied by the courts. But the evolutionary process is no less "creative" by reason of the fact that it is slow and that the judges and other men may not be conscious of it. All the rules of law that are described as "elementary" and "well settled" had an origin in the judicial process that may be obscure and a history covering several centuries in which there was no agreement on its wording and in which its application was variable and inconsistent. The

¹ CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 166 (1921).

² Corbin, *The Judicial Process Revisited*, 71 *YALE L.J.* 195 (1961).

doctrine of "consideration" for a promise is no less a creation of the courts that we cannot tell when and by whom it was invented, that we cannot even now agree upon its worded form or its application in the immensely variable transactions of life. The evolutionary development of the "law" is a constant process of adjustment to new circumstances and conditions, an adjustment by many thousands of jurists in many millions of cases in the long and endless history of man. This process of adjustment does not lead to a uniformity that is changeless and "absolute." Variation and diversity are the necessary manifestations of the process, in which every jurist plays his small creative part. In each decision, the judge must make a "choice," among variant rules, variant wordings of a supposed rule, and variant meanings of identical language. It is no less so today than in the past. As scientists well know, including that learned Jesuit priest, Teilhard de Chardin (recently deceased), the evolutionary process of life in all its manifestations—mental, moral, and physical—is the process by which our system of law was created and is being re-created for the future.

A critical review of any segment of the law reports, like that made by the author from 1950 to 1964, shows great differences in the degree of wisdom in the judicial choices and adjustments and in interpretation and analysis. In recent years, the author has given much consideration to the subject of the interpretation of written contracts as affected by the so-called Parol Evidence Rule. This article will conclude with a few illustrations taken from his chapters 25 and 26, including especially a few recently written sections in the 1964 Pocket Supplement to those chapters in volume 3 of the 1960 edition.

When in the course of its historical growth, a "rule of law" is put into express words that appear to be plain and clear, by a respected judge or other jurist, it may be repeated by other judges and writers for a century or more, with an assumption of its permanency and controlling force upon the court as well as upon the litigants. This is the assumption, even though the wording of the "rule" as now expressed is not the same as those of previous judges and writers. This is true even though the actual decision of the case before the court is inconsistent with its own wording of the "rule," or with previous wordings by other judges and writers. The "law" is so "well settled" that there is no need to collect and compare decisions, or to compare and interpret the various ways in which it has been formulated. In section 543AA, entitled "Growth of the Law in Spite of Long Repetition of Formalistic Rules," certain striking illustrations are given. Just prior to 1900, the author was taught that at law a "chose in action" (*e.g.*, a contract right) was by its very nature non-assignable, even though at that very time such assignments had been recognized and enforced for more than one hundred years. All that the assignee had to do was to sue in the name of the assignor. Thus the rule, though "well settled," did not affect the decision. Also, he was taught that two parties cannot by contract create an enforceable right in

a third party. The various ways in which this dogmatic "doctrine" had even then been emasculated are reviewed in the author's treatise. The "doctrine" is now so dead that a demonstration of the process of its dissolution is no longer necessary. But what a horrifying period of confusion and conflict there had been. No wonder that Justice wears a bandage on her eyes!

An example of such a "rule" is the so-called "Parol Evidence Rule," as it is applied in the interpretation of written contracts ("Integrations," as Wigmore has termed it).

It is a very commonly repeated statement that if the words of a written contract are "plain and clear" and "unambiguous" it needs no "interpretation" and extrinsic evidence, parol or written, is not admissible to aid its interpretation. In *Sokoloff v. Strick*,³ where the plaintiff sought a decree that a deed of trust and a promissory note were inoperative for the reason that they had expressly been executed as a "sham," the court threw out the case without even requiring the defendant to file an answer. The court said that the plaintiff was making an "attempt to evade, circumvent and nullify the parol evidence rule,"⁴ a rule which "must be firmly maintained if the integrity of written instruments is to be sustained instead of being rendered meaningless,"⁵ even the integrity of an instrument that has no "integrity"! The decision is shown no mercy in the author's note in the 1964 Pocket Supplement to vol. 3, section 577, note 34. The judge who wrote the opinion repeated his language in two subsequent cases, but in *Caplan v. Saltzman*,⁶ two judges dissented, saying: "While the parol evidence rule may be a 'Rock of Gibraltar' in the sea of contracts, it must not also be a Rock of Scylla upon which contractual obligations are shipwrecked and destroyed," and in *Kready v. Bechtel, Lutz & Jost*,⁷ the court held that the parol evidence was admissible, the judge who repeats his words in *Sokoloff* being a lone dissenter, saying: "The majority decision unintentionally, but without the slightest doubt *realistically*, undermines a myriad of recent and controlling decisions of this court." How necessary it is for a lawyer and a judge to keep abreast of the decisions and formulations (not merely a few) as "the law" proceeds in its evolutionary growth! Two recent cases in which the court expresses blanket approval of chapters 25 and 26 of the author's treatise are *Garden State Plaza Corp. v. S. S. Kresge Co.*⁸ and *Whitney v. Halibut, Inc.*⁹

A very widely accepted theory of interpretation of a written contract is that its words must be interpreted "objectively," and that the contracting parties are

³ 404 Pa. 343, 172 A.2d 302 (1961).

⁴ *Id.* at 346, 172 A.2d at 304.

⁵ *Id.* at 345, 172 A.2d at 303.

⁶ 407 Pa. 250, 254, 180 A.2d 240, 243 (1962).

⁷ 411 Pa. 569, 575, 193 A.2d 188, 192 (1963).

⁸ 78 N.J. Super. 485, 189 A.2d 448 (Super. Ct. 1963), citing MORGAN, BASIC PROBLEMS OF EVIDENCE (1962), and eight earlier New Jersey cases.

⁹ 202 A.2d 629 (Md. 1964).

bound in accordance with that "objective" meaning, whether it is in accord with their actual intention or not. This, also, is one of the many "doctrines" that requires critical analysis and much modification. A contractor may indeed be bound in accordance with an interpretation of the words of his contract that is different from the one that he gave to them himself, but this is never so if he can show that the other party either actually knew or had reason to know his actually intended meaning. Words, in any language have no meaning whatever apart from the persons by whom they are used and apart from the context and the circumstances of their use. Holmes once said that a word is merely "the skin of a living thought." It has no meaning other than the "thought" that some person uses it to express. But, you may ask, does not every word have one true and correct meaning, one that is given to us by "the dictionary"? No dictionary worth opening gives such a meaning. Instead it gives us only the historical usages of men. The better the dictionary, the more usages it reports and the more "definitions" it contains. The *Century Dictionary* gave twenty meanings of the word "right"; and the great *Oxford Dictionary* requires fourteen long columns of fine print to elucidate the meanings of the word "mean."

There is no space here in which to develop the author's theory of definition of words and interpretation of language. Special reference may be made to new section 543A, entitled "What is Ambiguity?," and section 543B, entitled "Process of Interpretation—Objective Meanings," both contained in the 1964 Pocket Supplement to volume 3 of his treatise. The latter section analyzes and discusses the case of *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*,¹⁰ dealing with a written contract for the sale of 100,000 pounds of "chicken" for shipment abroad. When resold at retail in Switzerland, the housewives rejected the birds because they had to be "stewed" and were not "fryers" and "broilers." The buyer sued the seller for damages, the issue being "what is chicken." Did this word have "one true and objective" meaning by which the parties were bound? The court listened to the testimony of many persons as to usages of the word; it did not discover the one true objective meaning, but it held that the seller had no reason to know that by "chicken" the buyer meant "fryers" and "broilers." The conclusion drawn from the case by this author is that the word "chicken" has no single "objective meaning," and that any meaning is an "objective meaning" if it is given to the word in any context by any person other than the two contracting parties.

One more interesting case will here be considered. It is stated and discussed in the 1964 Pocket Supplement to volume 3, section 543D, entitled "Semantic Stone Walls—What Are They Made Of?" That section begins as follows:

¹⁰ 190 F. Supp. 116 (S.D.N.Y. 1960).

A Warehouseman's Licensing Act provided that any person applying for such a license must file a bond for the security of depositors of goods, and also that any person making such a deposit should have a right of action on the bond in case of the warehouseman's default. This statute contained a preliminary "glossary" of definitions of Terms, including this: "Person shall mean an individual, corporation, partnership . . . but shall not mean the United States or Iowa State Government or any subdivision or agency of either." Later the defendant (warehouseman) and a surety company executed such a bond; and the United States deposited grain in his warehouse.

The grain was not returned, and the United States brought suit on the bond. In this case, *United States v. West View Grain Co.*,¹¹ the court held that the United States could not maintain the suit, for the reason that "when the plaintiff comes along the statutory path to the second statutory provision (authorizing suit) it is met with a semantic stone wall."

The shock on realizing that the court was depriving the greatest depositor of grain in the world of a remedy for the loss of its grain caused this author (already a doubter of absolute definition) to make a critical analysis of the facts and of the character of a "semantic stone wall." This analysis was published in his 1961 Pocket Supplement to volume 4, section 804, note 61. To the court, the words of the statute and of its glossary definition were "plain and clear" and "unambiguous," as indeed they are to anyone who merely glues his eyes upon the printed words, and it therefore applied the still repeated "rule" that extrinsic evidence is not admissible to aid in their interpretation. The court "knows" their true and "objective" meaning by reason of the wholly extrinsic evidence of its own linguistic experience and education. The court thus supplies the "thought" that it stuffs into the "skin" (the statutory words).

The conclusion arrived at in this analysis was that the words of the statute, like the words of every contract, must be interpreted in the light of the circumstances under which they were used and of the purposes of the persons by whom they were used. The statute used the word "person" to denote two very different classes—the persons who applied for a license and the persons who deposited grain. The incompetent lexicographer in making his "glossary" misinterpreted the words of the statute; he did not notice that the purpose of the legislature was to protect the second class of persons (the depositors) against the defaults of the first class of persons (the licensed warehousemen). This purpose required any private warehouseman to give a bond, but no such bond was necessary if the warehouseman happened to be the United States or the State of Iowa. Within a year, the legislature corrected the error of its lexicographer by amending the statutory definition. But the "stone wall" seen by the court was "semantic," made of "words" and not of "stone"; and "words"

¹¹ 189 F. Supp. 482, 487 (D. Iowa 1960).

must always be interpreted with the aid of relevant and credible extrinsic evidence, oral or written.

The analysis showed that the court's decision was erroneous for another and independent reason. The glossary definition of "person" was in any case applicable solely to the statute itself; it had no application to the words of any contract made by individual contractors. The "bond" on which the United States sued was executed by private individuals, and it plainly indicated that it was intended by the parties executing it for the protection of all depositors of grain as third party beneficiaries. It contained no exclusion of such depositors as the United States and the State of Iowa. By the common law of Iowa, such beneficiaries can maintain suit. In its suit on the bond, the United States Government was not coming "along the statutory path," but along the Iowa common law path applicable to surety bonds.

Fortunately, the United States was not deprived of relief by the *West View* decision. The surety company in that case was later compelled to make a settlement, and the United States brought two other suits in the same federal district court on exactly similar bonds in which the *West View* decision was expressly disapproved.¹²

It is now very generally recognized by the courts that the so-called "Parol Evidence Rule" is a rule of "substantive law," although at the same time they may repeat it in its evidentiary form and sometimes make an unjust decision. There is indeed a substantive "rule" of contract law to the effect that when two parties execute a writing which they agree upon as containing with completeness and accuracy all the terms of their contract, by that agreement all their antecedent inconsistent contracts and negotiations are supplanted and discharged. Whether they have agreed upon such a writing ("integration" as Wigmore speaks of it) is a question of fact, in the solution of which all relevant credible evidence, oral or written, is admissible. Whether such an "integration" is actually inconsistent with any antecedent contract or negotiation must be determined by a process of interpretation and comparison of the words of the "integration" and the antecedent transaction. This also is a question of fact, one that the court often reserves to itself and describes as a "matter of law." It is only after this interpretation is made that it can be determined whether the antecedent transaction has been made inoperative and discharged. It is only after this process of interpretation and comparison that the court can know whether the one varies and contradicts the other. Therefore, the so-called "Parol Evidence Rule" is not an exclusionary rule of evidence that affects in any way the process of "interpretation."

What then is "the law"? And is there no certainty in "language"? Are there not rules of law "fixed and settled" by which judges as well as other men

¹² *United States v. Tyler*, 220 F. Supp. 386 (D. Iowa 1963).

are bound, expressed in words that are "plain and clear" with one true and "objective" meaning? A long-time researcher must reply that there are no such "rules" and no such "words." Nevertheless, the "law" consists of "rules," an increasing multitude of them as time goes on. They are not to be scorned merely because they are "tentative working rules," growing and changing with the conditions of human life, and with the developing *mores* of mankind. Without them the world would be a chaotic and guideless world, with every man acting in accordance with his own vagrant emotion and desire. Also, a "rule" is not to be scorned merely because it is supported by one "authority" and not by another. "Authorities" vary greatly in merit and wisdom. The "rules" that they support are often conflicting, and after a longer or shorter time are always modified or supplanted by later "authorities." Therefore, every student, writer, and judge has a responsibility of his own. He must make a choice among "authorities," among "rules," and among interpretations of the words by which a rule is expressed. The author is not downgrading the "authority" of his own treatise when he invites every reader to make a critical study of the sources on which its many "tentative working rules" are based. Justice Cardozo, saintly and wise and understanding and sympathetic, was never able to find a "solid land of fixed and settled rules" or the "Paradise of a Justice" that would declare itself, and yet he went from the highest court in New York to the highest court of the United States. In spite of his "doubts and misgivings, hopes and fears," he had to depend upon his own "vacillating mind and conscience." In every case that a judge decides, he must realize that his decision and the "rule" or "principle" that he adopts and applies to the unique set of facts before him will constitute one more datum to be added to the multitude of those that preceded it, on the basis of which students and writers and other judges will create new rules and principles and doctrines to modify and supplant those that have served earlier days. What industry, what clarity of mind, and what nobility of conscience are required in this judicial process!